Supreme Court, U.S.
FILED

09-537 SEP 26 2009

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CYNTHIA SMITH *Petitioner,*

vs.

COMMONWWEALTH OF KENTUCKY
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of the Commonwealth Of Kentucky

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) A Police Officer may make an arrest on a misdemeanor only if it is committed in his presence, and as such, the DUI herein should be dismissed. (Fourth Amendment to the U.S. Constitution)

2) The Fourth Amendment's right to be protected from unreasonable searches and seizers was violated when the Petitioner was seized on her own "defacto" property. (Fourth Amendment to the U.S. Constitution)

3) The Petitioner Herein had reasonable grounds for missing a deadline and the denial of her appeal was a violation of her Fifth and Fourteenth Amendments to due process of law under the U.S. Constitution.

PARTIES TO THE PROCEEDING

The Petitioner is the Plaintiff-Appellee, *CYNTHIA SMITH.*

The Respondent is the Defendant-Appellant, the *COMMONWEALTH OF KENTUCKY.*

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K.R.S. 222.202 (1)

OPINIONS BELOW

The decision of the Supreme Court of the Commonwealth Of Kentucky is not published: *Cynthia Smith v. Commonwealth of Kentucky,* 2009 - SC-000110-D. It is included as Appendix A.

The decision of the Commonwealth of Kentucky Court of Appeals No. 2008-CA-001593-MR, it is not published. *Cynthia Smith v. Commonwealth of Kentucky,* it is included as appendix B.

The decision of the Hardin Circuit Court, Division III, Case No. 07-XX-00009 is unreported: *Commonwealth of Kentucky, Appellee, Cynthia Smith, Appellant.* It is included as Appendix C.

STATEMENT OF JURISDICTION

This case is within the jurisdiction of the Supreme Court of the United States because in the Hardin District Court, the Hardin Circuit Court, the Kentucky Court of Appeals, and the Supreme Court of Kentucky Petitioner preserved her rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Ammendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Ammendment, Fifth Ammendment, Sixth Ammendment, Eight Ammendment, and Fourteenth Ammendments to the United States Constitution are set forth, in relevant part, in Appendix D.

STATEMENT OF THE CASE, MATERIAL FACTS AND REASONS FOR GRANTING THE WRIT

1. The First Precise Issue to be Presented is:

A Police Officer may make an arrest on a misdemeanor only if it is committed in his presence. Petitioner was watching the neighbor's house while they were out of town. The neighbor had left his property in Petitioner's hands to watch while he was gone. The petitioner had gone out for the evening, when she returned she saw Police officers at the neighbor's home. Curious and feeling responsible for the property, the Petitioner walked across the street to where the Police Officers were to inquire as to what was going on at the neighbors home. Under the facts and circumstances of this case the Petitioner was the "defacto" owner of the property in question where she was arrested.

After a brief conversation with the Police Officers, the Petitioner was charged with DUI offense because the Police Officers recalled seeing automobile headlights pulling into the driveway of the petitioner's home. In any event the Police Officers eventually charged the Petitioner with a DUI offense only after the Petitioner walked across the street and had a conversation with

Police Officers and the Police Officers recalled seeing the headlights pull into the driveway.

It is important to note there was no evidence of erratic driving or anything else. The Police Officers recalled seeing the flash of car headlights pull into the Petitioners own driveway.

Must misdemeanors be committed in the presence of an arresting officer before he has the right to seize, arrest, and charge a defendant with a misdemeanor?

It has been the rule in Kentucky, and in the United States of America that probable cause to arrest a defendant for a misdemeanor is unlawful unless it is committed in the presence of the officer. In *MASH V. COMMONWEALTH,* 769 SW 2d p.p. 42, 43. (1989) *MASH,* id. states, in pertinent part, "...a police officer may ake an arrest without a warrant when a misdemeanor... has been committed in his presence."

This matter was also discussed in *JOHNSON V. COMMONWEALTH,* 443 S.W. 2d p.p.20, 22 (1969). *JOHNSON,* id, states, in pertinent part "...An Officer may not arrest on suspicion of commission of a misdemeanor, but may arrest when the misdemeanor has been committed in his presence..."

The Supreme Court of the United States of America has also ruled that a misdemeanor must be committed in the presence of the Police Officer before a warrantless seizure may take place. Said Court stated in *ATWATER ET, AL. V. CITY OF LAGO VISTA ET. AL.* (on April 24, 2001), The Supreme Court of the United States in 99 U.S. 1408 that:

> "...In cases of misdemeanor, a Police Officer like a private person has at common law no power of arresting

> without a warrant except when a breach of peace has been committed in his presence or that a breach of peace is about to be committed in his presence..."

The Highest court was quoting *CARROLL vs. UNITED STATES*, 267 U.S. 132 (192). (Quoting 9 *HALSBURY, LAWS OF ENGLAND* Section 612, p. 299 (1909)).

The facts in the case at bar are directly on point. The officer only said he saw flashing lights as someone was pulling in the driveway, whoever it was driving. There was absolutely no evidence of erratic driving or anything of the like kind of evidence. There was no evidence that Petitioner was driving the automobile.

The only evidence was that the Petitioner herein walked across the street and began talking with the Police Officers and that they perceived that she was intoxicated in their opinion. Thus, probable cause may have existed because of her actions after she crossed the street for the offence of public intoxication, and, even that questionable because she was watching over the home of the party who owned the home at his request while he was out of town. In effect, she was the "defacto" owner of the property and was thus not even in a public place. Thus, probable cause for public intoxication did not even exist.

It is crystal clear that the DUI must be dismissed with prejudice and that no evidence of any importance was existent regarding the public intoxication because Petitioner was merely checking out with the police about what had happened regarding the house that she was watching for her neighbor who was out of town as the "defacto" owner. In all fairness, the public intoxication charge also should not even exist. Allowing the guilty decision for DUI herein would be a gross violation of defendant's United States Constitutional Rights under the Fourth Amendment search and seizure rights, the Fifth and Fourteenth Amendment rights to have due process of law, Sixth Amendment right to a fair trial, and the Eighth Amendment right to be protected from cruel and unusual punishment. Further, Petitioner should not be even charged with Public Intoxication because the law is codified in KRS 222.202 said statue states in relevant part:

(1) A person is guilty of alcohol intoxication when he appears in a ***public place*** manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or unreasonably annoys persons in his vicinity. (Emphasis added) See also, *COMMONWEALTH v. MOBLEY*, 160 S.W. 3d. 783, 787 (Ky. 2005).

2. The Second Precise Issue to Be Presented is:

Were Petitioner's Fourth (4th) Amendment rights to be secure on her own "defacto" property violated when she was in effect "searched" or "examined" by policemen on her property since it is clear and uncontested that she was watching the property of the parties who requested that she watch their home.

The Law of the case is the Fourth (4th) Amendment to the United States Constitution. Specifically, the Constitution states in pertinent part, "...The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated..." The Petitioner prays that the Court will recognize that she was on her own "defacto" property.

3. The Third Precise Issue to Be Presented is simple:

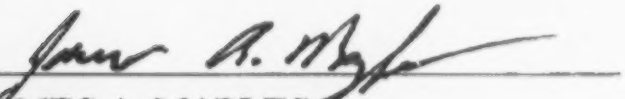
Petitioner had "reasonable grounds" to miss a deadline because she had moved and did not get proper notice of the prior appellate decision until a deadline passed without her knowing it. She had moved to another address and simply did not get the notice in the mail. The Petitioner was denied her Fifth and Fourteenth Amendment right to a due process.

A denial of Petitioner's Petition for Writ of Certiorari would be repugnant to the United States Constitution.

CONCLUSION

ıe Writ should be granted because if it is not the
:titioner's rights under the Fourth Ammendment, Fifth
ınmendment, Sixth Ammendment, Eighth Ammendment, and
›urteenth Ammendments to the United States Constitution
›uld be grossly violated. Further, the refusal would be
pugnant to Petitioner's rights under the United States
›nstitution.

ESPECTFULLY SUBMITTED TO THIS VERY
ONORABLE COURT,



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Hardin Circuit Court
Division III
Case No. 07-XX-00009

Commonwealth of Kentucky Appellant

VS. Opinion and Order Affirming

Cynthia Smith Appellee

****

The Defendant ("Smith") appeals her conditional guilty plea to DUI-2nd Offense. The issue on appeal is the Hardin District Court's determination that the required level of suspicion and eventual probable cause existed for the arrest of Smith on the charge. An oral argument took place as scheduled on June 17, 2008.

The only testimony offered to the district court was that of the arresting officer. The district court's factual findings are supported by the record. The officer was investigating an unrelated matter and was on the property of Smith's neighbor when Smith pulled into her own driveway. Smith approached the officers on the neighbors property to ask what they were doing. Although not placed under oath, Smith commented that she had been asked to watch the neighbor's house since they were not at home at the

time, and she went to the officers for that reason. Thus Smith concedes that the officers did not approach her on her own property.

During the conversation with Smith, the officer noted the smell of alcohol. Having observed Smith driving her car as she pulled into her driveway, the officer proceeded to investigate the situation and eventually arrested Smith on the DUI charge.

The district court correctly ruled that to the extent it was necessary, the officers would have had the needed suspicion to have detained Smith for further investigation. As the district court noted, this is not a typical situation of suspicion for a traffic stop but rather is an evaluation of probable cause for the arrest. There can be no doubt that probable cause existed at the point when the officers noted alcohol on Smith's breath and immediately prior to that observation, had observed Smith driving. Direct observation of operation of the vehicle actually is not required to investigate and arrest for DUI. See Blades v. Commonwealth, 957 S.W. 2d 246 (Ky. 1997). The law does not require officers basically to look the other way when circumstances are presented to them. Ct. Commonwealth v. Banks, 68

S.W. 3d 347 (Ky. 2001). Therefore,

IT IS HEREBY ORDERED AND ADJUDGED that the judgment of the Hardin District Court is affirmed.

So Ordered this 18th day of June, 2008.

s/Kelly Easton
JUDGE, HARDIN CIRCUIT COURT
DIVISION III

ENTERED 6/24/2008
ATTEST: LORETTA CRADY, CLERK
HARDIN CIR/ DIST COURT
BY s/M. BOWLING D.C.

Commonwealth of Kentucky

Court of Appeals

No. 2008-CA-001593-MR

CYNTHIA ANN SMITH MOVANT

ON MOTION FOR DISCRETIONARY
REVIEW APPEAL FROM
v. HARDIN CIRCUIT COURT
ACTION NO. 07-XX-00009

COMMONWEALTH OF KENTUCKY
RESPONDENT

****

ORDER

BEFORE: ACREE, DIXON AND STUMBO,
JUDGES

On June 24,2008, the Hardin Circuit Court entered an order affirming movant's October 13,2007, conviction in Hardin District Court for driving under the influence, second offense. On August 20, 2008, movant, by counsel, filed a motion

for extension of time to file a motion for discretionary review. Movant, by counsel, has also tendered a motion for discretionary review. No response to this motion has been filed.

CR 76.20(2)(a) provides that the failure of a party for file a motion for discretionary review within the time specified by this rule, or as extended by previous order, shall result in a dismissal of the motion for discretionary review.

The opinion and order of the Hardin Circuit Court was entered on June 24, 2008, thereby making July 24, 2008, the deadline to file a motion for discretionary review. Movant simply failed to timely file a motion for discretionary review in this court within the 30 day time period and identifies no previous order granting an extension of time to file a motion for discretionary review. The time for invoking the appellate court's jurisdiction by filling a motion for discretionary review may be extended before it expires, but the time may not be enlarged after it expires. CR 6.02, CR 76.20(2) (c) and AK *Steel Corporation v. Carico*, 122 S.W.3d 585 (Ky. 2003).

Having considered the motion for additional time to file a motion for discretionary review filed herein by the movant, and being otherwise sufficiently advised, this Court ODERS that this motion be, and it is hereby, DENIED. The above-styled appeal is hereby DISMISSED.

The Clerk of this Court is hereby DIRECTED to RETURN the tendered motion for discretionary review to the appellant on the date of entry of this order.

ENTERED: JAN 26 2009

s/Glenn Acree
JUDGE, COURT OF APPEALS

Supreme Court of Kentucky

2009-SC-000110-D
(2008-CA-001593-MR)

CYNTHIA ANN SMITH MOVANT

HARDIN CIRCUIT COURT
v. CASE NO. 07-XX-00009

COMMONWEALTH OF KENTUCKY
RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: August 19, 2009

s/John D. Minton JR
CHIEF JUSTICE

Appendix C

(1) The Fourth Ammendment, the Fifth Ammendment, the Sixth Ammendment, the Eighth Ammendment, and the Fourteenth Ammendments to the Constitution of the United States of America.

(2) The following Statutes:

(a) 28 U.S.C. SEC. 1254 (1)
(b) 28 U.S.C. SEC. 1341
(c) K.R.S. 222.202 (1)

Appendix D

CERTIFICATE OF COMPLIANCE
NO._____

CYNTHIA SMITH PETITIONER

V.

COMMONWEALTH OF KENTUCKY
RESPONDENT

As required by Supreme Court Rule 33.1 (h), I certify that the Brief for Writ of Certiorari contains 1075 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1 (d)

I declare under penalty of perjury that the foregoing is true and correct.
Executed on the 28th day of October, 2009.

James A. Maples,
Attorney for Petitioner
(Member of U.S. Supreme Court Bar since 1988)